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Protecting Health Coverage in Louisiana

I. Introduction

During the 2019 Regular Session, Louisiana Attorney General Jeff Landry proposed legislation that would establish a state-based framework for protecting individuals with preexisting medical conditions if and when the Supreme Court affirms the federal district court's decision in *Texas v. United States* that the Affordable Care Act (ACA) is unconstitutional in its entirety. The bill, entitled "Healthcare Coverage for Louisiana Families Protection Act," (introduced as SB 173, signed into law as Act 412) prohibits the denial of healthcare insurance for preexisting conditions, eliminates lifetime limits on the dollar value of benefits, and prohibits annual limits on the dollar value of essential benefits. It also allows for healthcare coverage on parent policies for any child until the age of twenty-six and ensures that any healthcare plan provides for essential health benefits such as ambulance care, emergency services, maternity and newborn care, hospitalizations, pediatric care, and prescription drugs, among others. By creating the "Louisiana Guaranteed Benefits Pool", the bill also adopts a proven framework for reducing sky-high healthcare premiums under the Affordable Care Act that have priced many Louisianans out of the market for healthcare coverage. The bill passed out of both chambers of the Legislature with overwhelming bi-partisan support, including without opposition in the Senate, and was signed by Governor John Bel Edwards on June 20, 2019.

Prior to the passage of Act 412 during the 2019 Session, Governor Edwards signed an Executive Order (JBE 19-4) creating the Protecting Health Coverage in Louisiana Task Force. The duty of the Task Force was, among other things, to "study and develop policy proposals" to maximize insurance coverage and minimize out-of-pocket medical costs for Louisianans. Despite the Task Force having no statutory or legislative authority, the Louisiana Attorney General's Office participated as a member of the Task Force simply out of the support for good government and to promote productive and thoughtful dialogue about the future of affordable healthcare in Louisiana. The Task Force held its first meeting in July 2019 and met roughly monthly through January 2020.

Unfortunately, the Governor's Office and its allies refused throughout the process to acknowledge or even discuss the benefits of the bi-partisan policy solution already put forth by the Attorney General and the Commissioner of Insurance, adopted by the Legislature, and signed by the Governor himself. In so doing, the Governor's Office and his administration continue to refuse to confront the very likely possibility that the Affordable Care Act will be invalidated. Instead, the Governor's Office used the Task Force as a nothing more than a vehicle to tout a false narrative about the Governor's failed Medicaid welfare expansion and the disastrous impact the ACA has had on the affordability of healthcare coverage. What the Governor's Office and his allies on the Task Force have produced is a political report, not a thoughtful or well-balanced policy discussion. Once again, politics has ruled over policy in Louisiana.

As an initial matter, the "report" drafted by the Governor's Office is full of inaccuracies and mischaracterizations. Not surprisingly, the only data cited in the report from our Democratic Governor comes from the liberal Kaiser Family Foundation, which has promoted Obamacare

since before the law's inception. The report cites out-of-state Kaiser data showing that 932,000 Louisianans have a "declinable preexisting condition" and suggests that these individuals would otherwise lose coverage if the ACA is repealed. Both the Kaiser data and the report grossly overstate the impact of the ACA. Many of these lives are not in the individual market but rather are covered by employer-based plans whose other preexisting protections (HIPAA and state-based) effectively address their needs. The ACA built on existing protections that already exist in federal and state law.[1] It was never the sole source for the entire market, nor the primary source for many participants.

The report prepared by the Governor's Office also misleads readers to believe that 456,000 people on Medicaid welfare expansion would lose coverage when the rest of the ACA is declared unconstitutional. Since Medicaid welfare expansion began, this administration has proven time and time again that it is incapable of accurately determining the number of individuals who qualify for Medicaid expansion and ensuring that only those individuals receive coverage. But even assuming that the number cited in the report is an accurate number for individuals covered by Medicaid welfare expansion, the data point overstates the potential "at risk" population. Many individuals in the expansion population would be otherwise eligible for Medicaid if expansion were to fall. This would decrease both the number of people losing coverage and the resultant reduction in federal funding. The availability of Section 1115 waivers to create additional eligibility classes is among the other factors that the administration ignored. Most importantly, however, it is unreasonable to assume that once the ACA is declared unconstitutional in its entirety that Congress will not provide both funding and flexibility for states to provide coverage to their most vulnerable citizens. In fact, earlier this month the Trump administration announced plans to issue guidance on Medicaid block grants that would give states more flexibility to try new ways to increase coverage.[2]

This Report, prepared by the Office of the Attorney General, is intended to provide healthcare providers, insurers, and all Louisiana citizens with a fact-based summary of how Louisiana will protect individuals with preexisting conditions and maximize access to affordable coverage if and when a final ruling is issued declaring the ACA unconstitutional in its entirety. As described in more detail below, with the passage of Act 412, Louisiana is more prepared for this event than almost any other state in the country. Indeed, other states are already looking to Louisiana as a model to adopt state-based solutions to protect preexisting conditions and lower premiums.

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[1] *See e.g.,* La. R.S. §§ 22:1062 (Increased Portability through Limitation on Preexisting Condition Exclusion), 1067 (Guaranteed Availability of Coverage for Employers in the Group Market), 1072 (Individual Health Insurance Coverage Portability and Limitation on Preexisting Condition Exclusions; Newborn Coverage; Coordination of Benefits), 1074 (Guaranteed Renewability of Individual Health Insurance Coverage), and 1095 (Rating Factors; Risk Pools; Individual Market Plan and Calendar Year Requirement).

[2] *See* Politico, "Trump administration finalizing Medicaid block grant plan targeting Obamacare" (Jan. 23, 2020), *available at* https://www.politico.com/news/2020/01/23/trump-targeting-obamacare-102887.

II. Background on *Texas v. United States*

In 2012, the Supreme Court, in *NFIB v. Sebelius*, 567 U.S. 519, ruled that the ACA's requirement that every individual secure and maintain health insurance or pay a penalty – a requirement commonly known as the "individual mandate" – was unconstitutional because Congress has no power to order Americans to buy a service. In the same stroke, however, the Court declined to strike down the law as a whole, finding that under a "saving construction," the shared-responsibility payment – the amount a person must pay for failing to comply with the individual mandate – could be construed as a tax intended to raise funds rather than a penalty for failure to buy insurance.

But in 2017, as part of President Trump's Tax Cuts and Jobs Act, Congress reduced the shared-responsibility payment to zero. Without the penalty, which was the basis for the Court's savings construction, the mandate was now left as an unconstitutional order upon Americans to purchase a good. Thus, in February 2018, a group of twenty states, led by Texas and including Louisiana, sued the federal government, challenging the constitutionality of the ACA in its entirety.

The plaintiff states argued that the individual mandate was no longer constitutional because: (1) *NFIB* rested the individual mandate's constitutionality exclusively on reading the provision as a tax; and (2) the 2017 law undermined any ability to characterize the individual mandate as a tax because the provision no longer generates revenue, a requirement for a tax. The plaintiffs argued further that, because the individual mandate was essential to and inseverable from the rest of the ACA, the entire ACA must be enjoined. On this theory, the plaintiffs sought declaratory relief that the individual mandate is unconstitutional and the rest of the ACA is inseverable. The plaintiffs also sought an injunction prohibiting the federal defendants from enforcing any provision of the ACA or its regulations.

Following oral arguments in September 2018, a federal judge in the Northern District of Texas agreed with the plaintiffs and declared the entire ACA to be invalid.

> Because rewriting the ACA without its "essential" feature is beyond the power of an Article III court, the Court thus adheres to Congress's textually expressed intent and binding Supreme Court precedent to find the Individual Mandate is inseverable from the ACA's remaining provisions.[3]

He issued his decision on December 14 and reaffirmed the decision in late December by issuing a stay and partial final judgment. This allowed the case to be appealed to the United Court of Appeals for the Fifth Circuit, whose jurisdiction includes Texas, Louisiana, and Mississippi.

On January 9, 2020, the Fifth Circuit affirmed the district court's holding that the individual mandate is unconstitutional.

> In *NFIB*, the individual mandate—most naturally read as a command to purchase insurance—was saved from unconstitutionality because it could be read together with the shared responsibility payment as an option to purchase insurance or pay a

[3] *Texas v. United States*, 4:18-cv-00167, at 2 (N.D. Tex. Dec. 14, 2018).

> tax. It could be read this way because the shared responsibility payment produced revenue. It no longer does so. Therefore, the most straightforward reading applies: the mandate is a command. Using that meaning, the individual mandate is unconstitutional.[4]

As to the question of whether the rest of the ACA is also unconstitutional, the appeals court remanded the case back to the district court to explain in more detail what provisions of the ACA are inseverable from the individual mandate. The rest of the ACA, with the exception of the individual mandate, will remain in effect during this time. Although a group of Democratic state attorneys general and Democratic members of the United States House of Representatives requested that the United States Supreme Court expedite review of the case prior to the district court carrying out the required analysis, the Supreme Court declined to do so.

III. The Affordable Care Act Isn't Working for Louisianans

Immediately after taking office, Governor Edwards rushed to sign an executive order expanding Medicaid welfare without any advance planning or preparation. Not surprisingly, the result has been disorganization, incompetence, and gross mismanagement of taxpayer dollars. In November 2018, the Louisiana Legislative Auditor released findings that the Louisiana Department of Health (LDH) had spent an additional $85 million over 20 months providing healthcare coverage for people who were not eligible for government funded healthcare. The Auditor took a small sample audit of 100 individuals, and 93 of them were ineligible to receive Medicaid benefits at the time they received Medicaid payments. The average income of these individuals was over $67,000 a year, which is over the allowable limit for income. There were at least 1,672 people making six-figure incomes who were on Medicaid. There was at least one person in the sample audit who made $145,000 a year.[5]

In response to the Auditor's findings, the Governor and the Secretary of LDH blamed the wasted taxpayer dollars entirely on antiquated computer systems yet never addressed why the administration chose to roll out a multi-billion-dollar program knowing that the state did not have technology in place to ensure the integrity of that program.

Following the Auditor's report, in March 2019, more than 30,000 people were removed from the Medicaid welfare expansion program after it was determined that they earned too much to receive the taxpayer-funded healthcare. Just months later, though, LDH announced it was temporarily suspending the use of the new software system amid a barrage of calls and information from Medicaid enrollees.

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[4] *Texas v. United States*, No. 19-10011, at 44 (5th Cir. Jan. 9, 2020).

[5] *See* Medicaid Eligibility: Wage Verification Process of the Expansion Population, Louisiana Department of Health, Medicaid Audit Unit (Nov. 8, 2018), *available at* https://www.lla.la.gov/PublicReports.nsf/1CDD30D9C828608286258340006 5E5F6/$FILE/0001ABC3.pdf.

Despite these massive problems with basic administration and operation of the Medicaid welfare expansion program, Governor Edwards and his administration still refuse to use the most accurate data available – income tax data – to prevent fraud and abuse within the program. In a May 2019 report, the Legislative Auditor wrote:

> Considering an increase of $794 million (or 6%) in the Medicaid budget for fiscal year 2020, the state has an ever-increasing obligation to reduce Medicaid improper payments. Also, considering the volatility of health care in Congress and the federal courts, Louisiana's obligations under the Medicaid program could change with the stroke of a pen. **To curb current and future state costs, every viable tool should be used. Using tax data would provide verification for Medicaid eligibility factors that are now self-attested by the applicant. Better information will lead to better results.**
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> We found that LDH has ceased its efforts to automate the use of federal tax information in its new eligibility and enrollment system, LaMEDS. In order to use the federal information to help determine an individual's eligibility, the Department must meet specific IRS requirements related to security, office space, and background checks. LDH officials said the compliance options either were not viable or were cost-prohibitive at this time.[6]

Although several bills were introduced during the 2019 Regular Session to comply with the Auditor's recommendation by requiring that LDH use income tax data to verify eligibility, the Governor opposed the bills, which ultimately died. At least thirty states use federal and/or state tax data as part of Medicaid eligibility determinations. Louisiana does not.

As evidenced by the above facts, Medicaid welfare expansion in Louisiana has been riddled with incompetence, fraud and abuse since it was first adopted by Governor Edwards. Tens of millions of dollars have already been wasted, and Medicaid spending continues to grow at an alarming and unsustainable pace. Yet, as evidenced by the Task Force agendas set by the Governor over the past seven months, the Governor and his administration continue to spend time and effort touting a flawed program rather than fixing the problems that already exist or discussing sound policy solutions like those adopted by the Legislature in Act 412.

Just as concerning as this administration's incompetence in rolling out and effectively managing the Medicaid welfare expansion program are the broader impacts that the ACA is having on Louisiana citizens and taxpayers.

Louisiana has seen an overall 42% increase in premiums between 2016 and 2020, based on a hypothetical 27-year-old's plan. Recent data reveals that health insurance premiums for Louisianans purchasing coverage in the individual market (meaning they are not covered by Medicaid and/or do not have employer-sponsored health insurance) are rising by an average of

[6] Medicaid Eligibility Determinations: Status on the Use of Federal Tax Information, Louisiana Department of Health, Medicaid Audit Unit (Sept. 11, 2019), *available at* https://www.lla.la.gov/PublicReports.nsf/3162ECE296E27F5686258472007296FB/$FILE/0001E246.pdf.

11.7%.[7] The average unsubsidized monthly premium for a policy in the individual market will be about $8,198 in 2020, up from $7,341 in 2019.[8]

As expected, these significant premium increases have impacted coverage. Most people receive subsidies for their premium costs, but even with those subsidies, the marketplace for individual insurance has become unaffordable. The number of Louisianans who signed up for health coverage through the ACA's individual exchange fell to its lowest point on record for the second straight year in 2020 (87,748 this year, down from 92,948 last year). The number of people signing up for coverage in the individual market has declined continuously and is now down 59% from its peak. No doubt this trend is a result of a broken system in which insurers have fled the market, and those who remain have raised rates by double digits.

IV. A Proven, Bi-Partisan Solution to Protect Health Coverage in Louisiana

A. The Maine Model

Following the federal district court's 2018 ruling that ACA was unconstitutional, the Attorney General began researching state-led policy reforms that would both maintain health insurance access for those with preexisting conditions in the current exchange market while also lowering premiums for everyone buying insurance in the individual market. Their research led them to examine the Maine Guaranteed Access Reinsurance Association ("MGARA").

During the 1990's, Maine found itself in a crisis situation following a series of ACA-like mandates on health insurers. Despite promises to expand access to everyone, the net result of the policy mandates in Maine was a perverse incentive for individuals to wait until they were sick to purchase coverage. As claims increased, premiums and deductibles for everyone skyrocketed. Young and healthy individuals fled the market, prompting even more severe premium hikes. By 2001, insurance premiums had more than doubled, and the number of people covered by an individual plan had dropped 65%.

In response, Maine passed legislation establishing an invisible, high-risk pool for individual insurance applicants with preexisting conditions. In practice, it functioned like a hybrid of a reinsurance program and a high-risk pool. It operated like a reinsurance program in that it reimbursed insurers for 90 - 100% of individuals' medical claims above a certain amount. It operated like a high-risk pool in that it only targeted a subset of individuals based on specific high-cost conditions. However, unlike traditional high-risk pools, Maine's program did not remove individuals with preexisting conditions out of the traditional market or charge them higher premiums. Most importantly, individuals who were included in the high-risk pool never knew they were in it; the program was completely invisible to the insured. The insurers determined if individuals needed to be placed into the high-risk pool, and it was handled behind the scenes. The high-cost or high-risk patient, including those with a preexisting condition, could apply for and enroll in the same health plans as everyone else at the same rates everyone else paid.

[7] Data provided by the Louisiana Department of Insurance.
[8] ACAsignups.net, 2020 Rate Changes, *available at* http://acasignups.net/rate-changes/2020.

In order to cover the costs of the program and incentivize good behavior by insurance companies, insurers were required to transfer ninety percent of collected premiums for all individuals in the high-risk pool to the reinsurance fund, or MGARA. This helped prevent insurers from gaming the system by removing the opportunity profit off individuals placed in the invisible high-risk pool. Conversely, if insurers aggressively placed individuals in the pool to avoid claim risk, they lost premium revenue.

In addition to this premium transfer requirement, the additional costs of the Maine program were funded by a small per member, per month assessment on all insurance policies. Together, these funds were sufficient to run the program.

The net result of the Maine reforms was a system that provided the right incentives to insurers while lowering premiums and attracting more coverage. *The Wall Street Journal*, in an official editorial about the reforms, wrote that premiums fell by as much as 69% for the state's dominant insurer.[9] Individuals in their early 20's saw premium savings of nearly $5,000 per year, while individuals in their 60's saw savings of more than $7,000 per year. As premiums began to drop, more healthy and young people purchased policies, helping stabilize a market that was once in crisis.

B. ACT 412

During the 2019 Legislative Session, the Attorney General and Commissioner of Insurance proposed a solution for Louisiana's declining coverage and skyrocketing premiums that built on the proven success of the Maine Model. Senate Bill 173 (Act 412), which was modeled largely after the MGARA, sought both to protect individuals with preexisting conditions and to establish a framework to lower premiums for all insured people. To achieve these goals, the bill:

- prohibited the denial of healthcare insurance for preexisting conditions;
- eliminated lifetime limits on the dollar value of benefits and prohibited annual limits on the dollar value of essential benefits;
- allowed for healthcare coverage on parent policies for any child until the age of 26 so young people can get established in the workforce;
- ensured that any healthcare plan provide for essential health benefits including ambulance care, emergency services, maternity and newborn care, hospitalizations, pediatric care, and prescription drugs, among others; and
- established a Guaranteed Benefits Pool modeled after Maine's program to help citizens realize lower healthcare premiums.

SB 173 passed the Louisiana Senate 38-0 and the Louisiana House 90-9, and it cleared the House Insurance Committee and the Senate Health and Welfare Committee without opposition. The Governor signed the bill into law on June 20, 2019.

The provisions of Act 412, including the establishment of the guaranteed benefits pool, will not become effective until a federal court, like the United States Supreme Court, issues a final ruling

[9] Wall Street Journal, "Obamacare in Reverse" (May 30, 2012), *available at* https://www.wsj.com/articles/SB10001424052702304707604577426162012576398.

that the entirety of the ACA is unconstitutional and adequate funding is identified. However, the law did require that the Commissioner of Insurance, by January 1, 2020, promulgate administrative rules to prepare for that event by defining "essential health benefits", establishing limitations on cost sharing and deductibles, and defining required levels of coverage. DOI completed that rulemaking in December 2019. Act 412 also required DOI to prepare an actuarial report detailing the design, parameters, and cost of the Guaranteed Benefits Pool. DOI issued a Request for Information to solicit stakeholder feedback to assist the agency in preparing the required report and plans to submit the report to the Joint Legislative Committee on the Budget no later than March 1, 2020.

Among the sources of funding that will be considered by DOI is funding used by states to pay the Health Insurance Provider Fee (HIPF). Managed care organizations were forced to pay the fee, but states were then required to cover their costs of doing so as a condition of receiving federal Medicaid funds. In essence, the fee forced Louisiana and other states to pay the federal government to help fund the Affordable Care Act. In 2016, a group of state attorneys general, including Louisiana, sued the federal government claiming that requiring states to cover the HIPF is unconstitutional and asking the federal government to repay all funds that have already been paid by the states. A federal district court judge for the Northern District of Texas refused to dismiss the action, and the case was appealed to the Fifth Circuit. Should the fee be deemed unconstitutional, Louisiana could recover up to $70 million.

DOI's actuarial analysis will also estimate the impact of a per member per month assessment on all policies to help fund the Louisiana Guaranteed Benefits Pool. In Maine, a small $4 per member per month assessment on all policies raised nearly $30 million to help finance the reinsurance fund. The minimal assessment proved worthwhile, as the data showed that every dollar assessed under the invisible high-risk pool produced a 5% reduction in premiums for all individual enrollees.

V. Conclusion

Despite signing an executive order establishing a task force to study and develop sound policy solutions to prepare Louisiana for a possible invalidation of the Affordable Care Act, the Governor's Office has used the task force as nothing more than a political tool to promote its own agenda. The report prepared by the Governor's Office not only contains numerous misleading statements but also fails to acknowledge the proven benefits of the bi-partisan reforms passed by the Legislature and signed by the Governor in 2019. Act 412 is a state-based policy solution that will protect individuals with preexisting conditions while lowering health insurance premiums. Because of Act 412, Louisiana is more prepared than other states to ensure access to affordable health insurance if the ACA is declared unconstitutional in its entirety.

The Attorney General will continue to work with the Commissioner of Insurance, the Legislature, and other stakeholders to implement the framework established in Act 412 and to identify necessary funding. Moreover, as evidenced by the public statements below, Louisiana's delegation in Congress also stands ready to work with these leaders to protect Louisiana families and the availability of high-quality, affordable healthcare in our State.

Public Statements in Support of Act 412

Rep. Steve Scalise

"As we have been working to fix serious problems with our healthcare system in Washington, I have also been following the healthcare debate in the Louisiana Legislature. We should all want a quality healthcare system that lowers costs, gives patients more choices, and protects people with pre-existing conditions from higher costs, while also improving the quality of care for everyone.

I commend Attorney General Jeff Landry, House Speaker Taylor Barras, State Senator Fred Mills, Chairman Kirk Talbot, and Insurance Commissioner Jim Donelon for working together with Members of the Louisiana Legislature who are interested in protecting people with pre-existing conditions.

There is no question that the Affordable Care Act (ACA) has not delivered what it promised: it is not affordable for families who have faced skyrocketing premiums and up to $10,000 deductibles; it has not lowered costs as promised; for millions of families across America, they were not allowed to keep their doctor; and many more had their existing private insurance plans cancelled.

On top of all of that, the ACA has added unnecessary red tape where unelected Washington bureaucrats have increasing power to make healthcare decisions for families and individuals.

I am confident, should the Louisiana Legislature move forward on a state-based solution, that the Federal government would continue to work with Louisiana officials, recognizing that state-based innovation is the best way to lower costs for patients, protect people with pre-existing conditions, and improve the quality of care for all Louisiana families."

https://www.republicanwhip.gov/news/scalise-statement-on-louisiana-efforts-to-protect-patients-with-pre-existing-conditions/

Sen. John Kennedy

"Since Congress refuses to repeal & replace Obamacare, states are taking charge. @AGJeffLandry is working to protect pre-existing conditions & create a way for families to buy plans that are FINALLY affordable and worth the paper they're written on."

https://twitter.com/SenJohnKennedy/status/1148247676754059264

Sen. Bill Cassidy

"Act 412 guarantees that Louisiana's low-income patients and patients with preexisting conditions will continue to be covered should the courts invalidate Obamacare. The Affordable Care Act has been anything but affordable as patients have faced skyrocketing premiums, higher costs and fewer choices. All Americans deserve better."